

The Honorable Ricardo S. Martinez

**UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE**

STATE OF WASHINGTON,

Plaintiff,

v.

ALDERWOOD SURGICAL CENTER, LLC,
a Washington limited liability company;
NORTHWEST NASAL SINUS CENTER
P.S., a Washington professional service
corporation; and JAVAD A. SAJAN, M.D.,

Defendants.

NO. 2:22-cv-01835-RSM

STATE'S REPLY IN SUPPORT OF
MOTION TO COMPEL PRODUCTION
OF CONSUMER NAMES AND EMAIL
ADDRESSES IN KEY DOCUMENTS

NOTE ON MOTION CALENDAR:
Friday, September 22, 2023

I. INTRODUCTION

The State's motion is narrowly focused and limited to the consumer names and email addresses that Defendants (collectively, Allure) unilaterally redacted from a discrete and narrowly defined set of non-disclosure agreements (NDAs) and related key documents. These NDAs were signed by consumers who voiced complaints to Allure and/or posted negative reviews. The State does *not* seek medical treatment information, which will all remain redacted, and the documents will be subject to the protective order. Dkt. #21. Allure's strident opposition to disclosing the identity of these core witnesses is particularly ironic, given that many of

1 Allure’s NDAs required its patients to *waive* HIPAA protections if they posted negative reviews.
 2 Dkt. #35, pp. 3-4; Dkt. #36-3; Dkt. #36-4.

3 Allure does not dispute the relevance of this information—yet it has prevented the State
 4 from contacting these core witnesses for the past two years. The State is entitled to this discovery:
 5 Allure’s threats and other communications with consumers relating to the NDAs and how Allure
 6 used the NDAs to restrict reviews is one of the most critical issues in this case. The State has
 7 shown good cause for requiring Allure to reveal the consumer names and email address in these
 8 key documents, and respectfully asks the Court to grant this motion.

9 II. REPLY

10 A. The State’s Motion Is Limited to the Consumer Names and Email Addresses 11 in a Discrete and Narrowly Defined Universe of Highly Relevant Documents

12 Allure spuriously asserts that the State “seeks the information so its employees can
 13 intrude on these patients’ privacy and question them about their medical experiences.” *See*
 14 Dkt. #37, p. 2. Not so. This motion is limited to several hundred post-service NDAs, internal
 15 emails, and emails and letters to and from patients. These documents are of key evidence of
 16 Allure’s systematic suppression of negative reviews through its responses to consumer
 17 complaints, negative reviews, and use of post-service NDAs. *See* Dkt. #31, pp. 1-8;
 18 Dkt. #32-17, pp. 1-3, 8-87, 96-103. Again, the State does *not* seek medical treatment
 19 information; it only seeks the names and email addresses of these consumer witnesses that Allure
 20 has kept hidden. *Id.*

21 The State has provided myriad examples demonstrating the compelling nature of this
 22 evidence and its relevance. *See* Dkt. #31, pp. 3-8; Dkts. #32-8, #32-9, #32-10, #32-11, #32-12,
 23 #32-13 & #32-14; *see also* Supplemental Declaration of Matthew Geyman (Geyman Supp.
 24 Decl.), Ex. A (internal email from Dr. Sajan, titled “negative review hair transplant,” attaching
 25 negative review and stating, “We need to find a way to reach out and fix”), Ex. B (post-service
 26 NDA, attaching \$1,000 check to consumer, stating “Payment in consideration of review

removal”). Allure cannot dispute the extremely relevant content of these documents, or that these consumers would be key witnesses.

In response, Allure conflates the pre-service and post-service NDAs, arguing that “[i]f these documents are indeed impermissible ‘form contracts’ as the [AGO] has consistently claimed, un-redacted versions are not necessary for the [AGO] to prove its case.” Dkt. #37, p. 9. This is not the issue. The State has a pending motion for partial summary judgment regarding the *pre-service* NDAs, *see* Dkt. #35, but it does not cover Allure’s use of *post-service* NDAs. Whether the post-service NDAs are “form agreements” under the Consumer Review Fairness Act depends on whether Allure imposed them on consumers “without a meaningful opportunity for such individual[s] to negotiate the standardized terms,” 15 U.S.C. § 45b(3)(A)(ii), an allegation Allure *disputes*. *See* Dkt. #30, p. 23, ¶ 150 & p. 36, ¶ 15. Consumer names and emails are essential to obtaining testimony that will prove that Allure did not provide consumers a meaningful opportunity to negotiate this set of NDAs.

The evidence the State seeks is also central to its claims under the Consumer Protection Act regarding Allure’s unfair and deceptive use of *both* types of NDAs, both pre- and post-service, to restrict patients from posting negative reviews or, if that did not succeed, to threaten or coerce them to remove negative reviews once posted. *See* Dkt. #1, p. 2-4, ¶¶ 6-15, and pp. 29-30, ¶ 175(a)-(d). As Allure certainly knows, without the opportunity to speak to the consumers named in these key documents, the State cannot develop the evidence to support these claims. *See* Dkt. #1, p. 3, ¶¶ 10-12, and p. 13, ¶¶ 63-67.

Allure suggests that if consumers wished to speak to the State, they would have reached out to the State following the public announcement of this case. Dkt. #37, p. 9. ***But Allure’s systematic use of NDAs created an environment where its patients believe they will face severe penalties for speaking the truth.*** *See, e.g.,* Dkt. #34-1, pp. 4, 6-17; Dkt. #34-4, pp. 3-4, 10-17; Dkt. #36-2, pp. 2-3, ¶¶ 4-7; Dkt. #36-7, pp. 3-4, ¶¶ 5-11; Geyman Supp. Decl., Ex. C (Declaration of Ash Navone) (Navone Decl.) (Sept. 14, 2023), ¶¶ 4, 12-16; *id.*, Ex. D (Declaration of Shieliene

1 Raines) (Raines Decl.) (Sept. 19, 2023), ¶¶ 5-15. Allure also provides no basis for its assumption
 2 that its patients and former patients know about this case. To the contrary, a number of consumers
 3 have told the State they had no idea about this case until they learned of it recently by other
 4 means. *See, e.g., id.*, Ex. C, Navone Decl., ¶ 17; *id.*, Ex. D, Raines Decl., ¶¶ 19-20.

5 **B. The State Has Established Good Cause to Require Disclosure of Consumer**
 6 **Names and Email Addresses in these Key Documents**

7 Allure does not dispute that the protective order, Dkt. #21, will protect the consumer
 8 names and email addresses at issue from public disclosure. And it admits that the only question
 9 for the Court is whether the State has shown good cause for obtaining this highly relevant
 10 information. *See* Dkt. #31, pp. 8-9; Dkt. #32-16 (Allure’s discovery responses, stating “no PHI
 11 will be disclosed absent entry of a protective order by the Court and a showing of good cause.”).
 12 Because the State has shown good cause, the motion should be granted.

13 Allure also does not dispute that federal courts have regularly held that individuals’
 14 contact information is discoverable and may be produced where the requesting party shows good
 15 cause for obtaining it and it will be protected by an adequate protective order. *See* Dkt. #31, p.
 16 11 (citing cases). Allure further concedes this is a balancing test, weighing the need for the
 17 discovery against the privacy interest. *See* Dkt. #37, p. 8; *see also Fryer v. Brown*,
 18 No. C04-5481, 2005 WL 1677940, *5-7 (W.D. Wash. July 15, 2005) (laying out basic standard
 19 for balancing privacy with need for information, holding that need outweighed privacy interest).
 20 It is a case-by-case determination, at the Court’s discretion.

21 Thus, where the need for the discovery outweighs the potential intrusion, discovery
 22 should be granted. This is *especially* true when the entity requesting contact information seeks
 23 to vindicate the rights of those very individuals. *See M.J. v. District of Columbia*,
 24 No. 18-cv-01901, 2020 WL 13668559, at *6-8 (D.D.C. July 1, 2020) (reasoning that plaintiff’s
 25 role as an advocacy organization “empowered under federal statutes” to protect the rights at issue
 26 weighed in favor of compelling disclosure of contact information); *FTC v. Amazon.com, Inc.*,

1 No. C14-1038, 2015 WL 11256312, at *3 (W.D. Wash. Aug. 3, 2015) (granting request to
2 compel Amazon to produce customer contact information, reasoning that FTC’s use of the
3 information to contact potentially injured customers was “consistent with the FTC’s role as a
4 consumer protection agency”).

5 Here, as in other similar cases, the State’s need for the consumer names and email
6 addresses in these key documents, when protected by the protective order and after redacting
7 any medical treatment information, outweighs the limited intrusion of disclosing the names and
8 email addresses. *See Artis v. Deere & Co.*, 276 F.R.D. 348, 353 (N.D. Cal. 2011) (distinguishing
9 limited privacy interest in “names, addresses, and phone numbers” from “more intimate privacy
10 interests such as compelled disclosure of medical records and personal histories”); *M.J. v.*
11 *District of Columbia*, 2020 WL 13668559, at *6-8 (ordering disclosure of contact information
12 for children and their guardians relating to mental health information, holding that need for class
13 discovery outweighed privacy interests); *Washington v. Matheson Flight Extenders, Inc.*, No.
14 C17-1925-JCC, 2019 WL 1957710, at *3 (W.D. Wash. May 2, 2019) (granting state’s motion
15 to compel production of employee documents regarding disability accommodations despite
16 privacy interest in medical records because evidence was highly relevant and important).¹

17 **C. Washington’s PHI Statute Does Not Bar Disclosure Here**

18 Washington’s PHI law does not govern in cases like this one that involve federal claims.
19 Dkt. #31, p. 11; *Microsoft Corp. v. Immersion Corp.*, No. C07-936RSM, 2008 WL 11343462,
20 at *2 (W.D. Wash. Mar. 24, 2008). This rule is rooted in Fed. R. Evid. 501 and the Supremacy
21 Clause. *Id.*; *see also Kalinoski v. Evans*, 377 F. Supp. 2d 136, 140-41 (D.D.C. 2005).

22
23
24 ¹ Allure’s reliance on *Wetzel v. CertainTeed Corp.*, No. 16-cv-01160, 2018 WL 9415115, at *3
25 (W.D. Wash. Apr. 19, 2018), *see* Dkt. #37, p. 8 n.25, is misplaced. In *Wetzel*, the court simply held that
26 it was unnecessary for the defendant to produce unredacted personal identification information of its
customers at that early stage of the case, adding that “Plaintiff may raise this issue again during the merits
discovery process.” *Id.*

Allure's fleeting argument that the 2013 HIPAA rules render this established rule meaningless, *see* Dkt. #37, p. 11, is wholly unsupported. Allure mistakenly argues that this rule is limited to "unique circumstances." *Id.*, p. 12. It ignores the recognition in *Williams* that "a majority of courts have concluded that HIPAA does not incorporate state statutes with stricter confidentiality provisions for the purpose of litigation in federal court when jurisdiction is based on a federal question." *Williams v. City of Philadelphia*, No. 08-1979, 2104 WL 5393988, *5-6 (E.D. Penn. Oct. 22, 2014). *See also, e.g., United States v. Slavin*, No. 22-cv-21375, 2023 WL 2891161, *3-4 (S.D. Fla. Jan. 15, 2023); *Bach v. Amedisys, Inc.*, No. CV 10-395-BAJ-RLB, 2017 WL 11768429, at *2-4 (M.D. La. Mar. 30, 2017). Further, the Department of Health and Human Services' final HIPAA rules state that "neither the HIPAA statute nor its implementing regulations give effect to . . . provisions of State law relating to the privacy of individually identifiable health information for use in Federal court proceedings." Dkt. #31, p. 11. Allure ignores this definitive statement.

D. The State's Redaction Errors Are a Red Herring²

Allure's extensive discussion of the State's redaction errors in filing this motion only demonstrates how desperately it wants to keep the State from interviewing these witnesses. *See* Dkt. #37, pp. 4, 7-8, 13-14. The State takes very seriously its responsibility to protect confidential information under the protective order and the local rules. The State's redaction mistakes were isolated and immediately corrected. *See* Dkt. #33; Dkt. #34; *see also* Geyman

² Allure's claim that the State improperly failed to redact documents produced in response to its public records request, *see* Dkt. #37, p. 7, is wrong. Those documents were attachments to consumer complaints and were produced in the same form in which they were submitted to the AGO, as required under State public records law. These consumers agreed when they submitted their complaints that the complaints and all related documents would become public records under state law and could be disclosed to the public. *See* Geyman Supp. Decl., ¶¶ 6-9 & Ex. E. Likewise, Allure has misled the Court by suggesting that the State's investigator threatened a witness. *See* Dkt. #37, p. 8; Dkt. # 38, Ex. D. Allure failed to provide the Court with the subsequent email from that witness to the State's investigator, in which that individual apologized for the misunderstanding, stating, "I apologize for misinterpreting the voicemail you left me in regards to being subpoenaed to speak with you or your office. I truly appreciated the clarification." Geyman Supp. Decl., Ex. F.

1 Supp. Decl., ¶¶ 11-21 & Ex. G. The State has reviewed its processes and will make every effort
2 to ensure that such mistakes do not happen again. The State is prepared to provide any further
3 explanation the Court would like on these issues.

4 **III. CONCLUSION**

5 For the foregoing reasons, the State has shown good cause for ordering Allure to remove
6 redactions and produce the consumer names and email addresses in the key documents identified
7 in this motion. This motion should be granted.

8 DATED this 22nd day of September, 2023.

9
10 ROBERT W. FERGUSON
Attorney General

11
12 s/ Matthew Geyman
13 MATTHEW GEYMAN, WSBA #17544
14 CAMILLE M. MCDORMAN, WSBA #53036
15 ZORBA LESLIE, WSBA #58523
Assistant Attorneys General
Attorneys for State of Washington
Attorney General's Office
800 Fifth Avenue, Suite 2000
16 Seattle, WA 98104

17 *I certify that this memorandum contains 2,070*
18 *words in compliance with the Local Civil Rules.*

CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the State of Washington that I caused a copy of the foregoing to be served on all counsel of record via the ECF system.

DATED this 22nd day of September, 2023, at Seattle, Washington.

s/ Matthew Geyman

MATTHEW GEYMAN, WSBA #17544
Assistant Attorney General